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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WILLIAM DUNCAN, Warden, *Petitioner*,

v.

RONNIE EARL BAYLOR, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Anti-terrorism and Effective Death Penalty Act of 1996, does § 2254(d)(1) of 28 U.S.C. require federal courts, in habeas corpus cases, to defer to state court adjudications of an ineffective assistance of counsel claim unless the decision is an "unreasonable application" of *Strickland v. Washington*, 466 U.S. 668 (1984), or does the effect of the "contrary to" prong of § 2254(d)(1) leave a federal court's historic power to exercise *de novo* plenary review "not affected?"

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

WILLIAM DUNCAN, Warden, *Petitioner*,

v.

RONNIE EARL BAYLOR, *Respondent*.

William Duncan, Warden, of the California Men's Colony at San Luis Obispo, ("the Warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1/]

OPINION BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the district court, is reported as *Baylor v. Estelle*, 94 F.3d 1321 (9th Cir. 1996). A copy of the opinion is reproduced in Appendix A of this Petition. The order of the Ninth Circuit, denying rehearing and rehearing *en banc*, is unreported and reproduced in Appendix B. The order of the California Supreme Court, denying Baylor's petition for writ of *habeas corpus* is unpublished, and is reproduced in Appendix C.

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1. Wayne Estelle, the former Warden of the California Men's Colony, San Luis Obispo, has been replaced by William Duncan, the current Warden. Thus, William Duncan is the proper Petitioner in this case.

STATEMENT OF JURISDICTION

The opinion below was filed on September 4, 1996. The Ninth Circuit denied the Warden's petition for rehearing and suggestion for rehearing *en banc* on October 24, 1996.

Respondent Baylor first invoked federal court jurisdiction in his *habeas corpus* case under 28 U.S.C. § 2254. The Warden now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .
>
> (d) An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

STATEMENT OF THE CASE

In 1987, Ronnie Earl Baylor, then a Marine Corps sergeant, was convicted of, inter alia, rape, assault with the intent to commit rape, and sodomy against two women in separate incidents, in Twenty-nine Palms, California. The basis for Baylor's conviction included his confession, where Baylor revealed the details of the sexual assaults, including that he had prior to the rape of one victim removed five bullets from her gun, while she was sleeping, and hid the bullets under a large sofa chair in the victim's living room. Acting on his confession, the police recovered the five bullets from under the chair, and they were admitted into evidence at trial.

Baylor appealed his conviction, but raised only sentencing errors. In 1990, Baylor filed a *habeas corpus* petition with the California Supreme Court where he alleged, inter alia, he was denied his Sixth Amendment right to effective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), because counsel failed to present a potentially exculpatory criminalistic laboratory report at trial. The petition acknowledged Baylor's rape and sexual assault convictions, involving two women on separate occasions, and his confession, but alleged that the unadmitted report would have excluded him as the semen donor of semen collected in one of the rapes. The court denied the petition without citation to authority. (Appendix C.)

In 1991, Baylor filed a *habeas corpus* petition with the United States District Court, raising the same issue. The magistrate judge ordered an evidentiary hearing to determine whether Baylor received effective assistance of counsel. After the hearing, the magistrate judge found trial counsel's performance was inadequate under *Strickland v. Washington*, but in light of Baylor's detailed and taped confession to police,[2] Baylor was not prejudiced because the laboratory report did not absolutely exclude him as the rapist as to one of the victims. The district court judge adopted the magistrate judge's recommendations, and dismissed the petition with prejudice, stating, had Baylor submitted evidence that his semen was somehow different from the semen collected from the rape victims, his petition would have been granted.

Baylor filed a motion for reconsideration, and asked that his semen be tested now, in 1994. The district court ordered the testing over the Warden's objection that the test results would be irrelevant given there was no scientific basis to assure that a test given seven years after the assault would accurately reflect the condition of Baylor's semen at the time of the sexual assaults. The original criminalist, who analyzed the rape samples in 1987 and produced the laboratory report, analyzed Baylor's current semen sample. He opined Baylor still could not be eliminated as the rapist as to one of the victims. However, a defense expert opined that Baylor could be eliminated as the semen donor, and a newly appointed independent expert was unequivocal that Baylor could not

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2. Baylor, a Marine Corps sergeant at the time of his confession, repudiated the taped confession at trial, stating the police detective coerced him, and supplied him with details of the attacks. However, Baylor moved to suppress the confession on the sole ground he did not receive sufficient *Miranda* warnings before he confessed.

have been the rapist.[3] The district court judge characterized these opinions as "unrefuted scientific evidence" that Baylor could not have been the rapist, and concluded that such evidence would have caused the jury to have a reasonable doubt as to Baylor's guilt as to all seven of the criminal charges against him, despite his confession. The district court granted the petition, and vacated all seven convictions against Baylor, which included rape, sodomy, assault with intent to commit rape, robbery, grand theft of a firearm, and two counts of burglary.[4] The Warden timely appealed the district court's judgment.

On appeal before the Court of Appeals for the Ninth Circuit, approximately six weeks before oral argument, the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. The Ninth Circuit permitted supplemental briefing on the applicability of the Act to pending cases. The Warden argued, inter alia, that under section 2254(d)(1), the California Supreme Court's denial of Baylor's state *habeas corpus* petition was neither "contrary to" nor an "unreasonable application of" *Strickland*.

In its published opinion, the Ninth Circuit upheld the district court's grant of the writ under the "old law," but noted that "whether or not the [Anti-terrorism and Effective Death Penalty] Act applies to pending appeals, our decision would be the same." *Baylor v. Estelle*, 94 F.3d

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3. The independent expert was not appointed to render a legal opinion as to the sufficiency of the evidence under California's rape statute.

4. Baylor had been released from state prison, on parole, approximately three weeks before the district court's decision. However, a reinstatement of the convictions against him would carry collateral legal consequences. Therefore, a live controversy still remains. *Minnesota v. Dickerson*, 508 U.S. 366, 371-372 n.2 (1993).

1321, 1325 (9th Cir. 1996).[5/] The court found that under the newly amended § 2254(d), the court's "analysis in this case is not affected," *id.* at 1323, holding that "[i]n this case, the state court decision was contrary to clearly established federal law determined by the Court in *Strickland*." *Id.* at 1325.

Under its "not affected" analysis, the Ninth Circuit, in effect, conducted a *de novo* plenary review of Baylor's ineffective assistance of counsel claim. Under this standard, the court found deficient performance and prejudice under *Strickland*.

The Warden filed a timely petition for rehearing and rehearing *en banc*, arguing the Ninth Circuit's ruling, that the California Supreme Court decision was "contrary to" *Strickland*, had misinterpreted § 2254(d)(1). The petition argued that the "contrary to" prong of § 2254(d)(1) simply required inquiry into whether the state court had applied the correct legal standard. The petition further stated there was no indication the California Supreme Court used any legal standard other than *Strickland* to evaluate and deny Baylor's state *habeas* petition. Therefore, the state adjudication was not "contrary to" clearly established federal law within the meaning of the first prong of § 2254(d)(1).

The petition for rehearing also argued the Ninth Circuit's interpretation of § 2254(d)(1) rendered the "unreasonable application" language of the statute meaningless and superfluous. The Warden further argued the proper inquiry should therefore have been whether the state court's adjudication was "an unreasonable application of" *Strickland*, and asked the Ninth Circuit to

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5. The Warden submits the AEDPA does apply to pending cases. That issue is already before the Court in *Lindh v. Murphy*, case number 96-6298. The issue presented in the instant petition is the effect that newly amended § 2254(d)(1) has on federal review of state court adjudications.

review this case under the second prong of § 2254(d)(1). The Ninth Circuit denied the petition for rehearing and suggestion for rehearing *en banc*. (Appendix B.)

REASONS FOR GRANTING THE PETITION

This case requires the Court to decide, if, and when, the "contrary to" prong of amended § 2254(d)(1) applies to state court denials of ineffective assistance of counsel claims, alleged under the Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). Does this provision apply at all, where there is no showing, or even any question, that the state court applied anything but *Strickland* in denying the claim?

Thus, the Court must decide if, as other circuits have held, the "contrary to" prong of § 2254(d)(1) simply requires inquiry as to whether an applicable standard even exists, see *Lindh v. Murphy*, 96 F.3d 856, 868-869, 874, 875-876 (7th Cir. 1996), and, if so, the inquiry focuses on whether the state court has applied the standard to the case, see *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), or if, this inquiry instead allows, as the Ninth Circuit has necessarily done in this case, a federal court to conduct plenary *de novo* review. Thus, the Court must decide if the Warden is correct, as he argued before the Ninth Circuit, that the "contrary to" prong is not violated where there is no reason to believe that the state court applied anything else but the *Strickland* standard in denying the claim.

The Court's authoritative guidance on these questions is vital because there is a conflict among the Courts of Appeals, as to the proper statutory construction of § 2254(d)(1).

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE PROPER INTERPRETATION OF 28 U.S.C. § 2254 (d)

Historically, the Court has characterized an ineffective assistance of counsel claim under *Strickland* as a mixed question of law and fact. See, *Strickland*, at 698; *Thompson v. Keohane*, ___ U.S. ___, 133 L.Ed.2d 383, 394 (1995). The Ninth Circuit's interpretation of amended § 2254(d)(1) creates a conflict with decisions from the Fifth and Seventh Circuits concerning the applicability of the new statute to such a question of law and fact. In *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996) and *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), the Courts of Appeals found the new subdivision 2254(d) creates a deferential standard for *habeas* review of state court convictions.

The three-tier pattern of the statute logically corresponds to the three types of issues which may be raised in any case: questions of law, mixed questions of law and fact, and questions of fact. Therefore, under the first prong of section 2254(d)(1), the standard of federal review for purely legal questions should be whether the state court decision was "contrary to" clearly established Federal law, as determined by the Court. Under the second prong of § 2254(d)(1), the standard of review for mixed questions of law and fact should be whether the state court decision involved "an unreasonable application" of clearly established Federal law, as determined by the Court. Under § 2254(d)(2), the standard of review for purely factual determinations should be whether the state court decision was based on "an unreasonable determination of the facts" in light of the evidence

presented in the State court proceeding. This interpretation gives full effect to each provision of section 2254(d). *Lindh v. Murphy*, 96 F.3d at 870; *Drinkard v. Johnson*, 97 F.3d at 767-68.

The *Baylor* decision, in conflict with *Lindh* and *Drinkard*, did not draw any of the above-described distinctions, and instead summarily found the state court adjudication was "contrary to" *Strickland*, without consideration of whether there was "an unreasonable application of" *Strickland*, essentially blurring any distinction intended by Congress. The court, without explanation, reviewed the *Strickland* claim under the "contrary to" language of § 2254(d)(1). The only authority cited by the court in support of its view was *Ayala v. Speckard*, 89 F.3d 91, 96-97 (2d Cir. 1996). In *Ayala*, it appeared the state court failed to consider three of the necessary four prongs to determine whether court proceedings should be open to the public, as established by the United States Supreme Court. Since the state court failed to use the proper legal standard, as required under Supreme Court precedent, the state court judgment *was* "contrary to" clearly established federal law. *Id.* at 96-97. *Ayala* does not appear to support the Ninth Circuit's position.

The conflict between *Baylor* and *Lindh* or *Drinkard* shows one interpretation defers to the state court adjudication, while the other interpretation retains *de novo* plenary review.

Lindh holds

> . . . we do not read the 'contrary to . . .' language to authorize issuance of a writ whenever a court errs, as Lindh and amici prefer; that would vitiate the second ('unreasonable application') clause of § 2254(d)(1). The two clauses have separate functions. We must ensure that the Supreme Court of Wisconsin adheres to legal principles

> articulated by the Supreme Court of the United States. But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts--when it is, in the standard phrase, a 'mixed question of law and fact' --sec. 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects 'an unreasonable application' of the law.

Lindh, 96 F.3d at 869.

Lindh further holds "For current purposes, it is enough to say that when the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored." *Lindh*, 96 F.3d at 870.

Similarly, *Drinkard* holds "The first question we ask is whether the state court's resolution of any legal questions underlying its decision on this claim was contrary to clearly established federal law . . . . The court correctly determined the law applicable to Drinkard's claim." *Drinkard*, 97 F.3d at 768.

Drinkard further holds

> an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant *habeas* relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Drinkard, 97 F.3d at 769.

On the other hand, the *Baylor* court, by holding that its analysis "is not affected by [the amended] § 2254(d)," in effect, conducted a *de novo* plenary review. *Id*. at 1323-4. In conducting this review, *Baylor* states further that even though the state court conviction was based on "strong evidence," "we cannot say the *district*

court erred . . . *Our* confidence in the outcome of the trial is shaken." *Baylor*, 94 F.3d at 1324, emphasis added. Thus, where *Lindh* and *Drinkard* look only for the applicable legal standard on pure questions of law, and give deference to the state court on mixed questions of law and fact, *Baylor* instead gives deference to the lower federal court, based on plenary review, and does not examine the reasonableness of the state court adjudication.[6/]

These conflicting interpretations, of the identical statute, are irreconcilable, and the conflict can only be resolved by the Court. The various interpretations of § 2254(d) have left the intent and meaning of the statute in a state of confusion, with no direction for the lower courts.

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6. If the Ninth Circuit had found, as it should have, the AEDPA applies to pending cases, and if the Ninth Circuit had examined the reasonableness of the California Supreme Court's adjudication under the second prong of § 2254(d)(1), as it should have, the Warden would have prevailed.

Baylor has not, and cannot, show the California Supreme Court unreasonably applied both prongs of *Strickland*, in a case where we know what was before the California Supreme Court by way of Baylor's petition, and the applicable law: 1) Baylor was convicted of two separate incidents of sexual offenses, committed against different victims; 2) Baylor confessed to both incidents; 3) an unadmitted laboratory report would have excluded him as the semen donor of semen collected in one of the rapes; and 4) proof identifying the defendant's semen in or on the rape victim is not an element of rape under California law. See California Penal Code § 261.

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, in the case at bar.

Dated: January 21, 1997.

Respectfully submitted,

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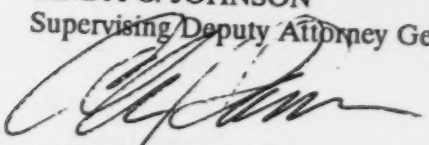

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONNIE EARL BAYLOR,
Petitioner-Appellee,

v.

WAYNE ESTELLE, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellants.

No. 95-56124
D.C. No. CV-91-3752-KN(EE)
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted June 4, 1996
Submission Vacated June 5, 1996
Resubmitted
July 26, 1996—Pasadena, California

Filed September 4, 1996

Before: Melvin Brunetti and Pamela Ann Rymer, Circuit Judges, and Jack E. Tanner,* District Judge.

Opinion by Judge Rymer

*Honorable Jack E. Tanner, Senior United States District Judge, Western District of Washington, sitting by designation.

SUMMARY

Criminal Law and Procedure/Right to Counsel/ Sex Crimes

The court of appeals affirmed a district court judgment. The court held that counsel did not give reasonably effective assistance, where counsel failed to follow up on a criminalist's report that concluded that a semen sample taken from a victim that the defendant was convicted of sexually assaulting might not have come from the defendant.

Appellee Ronnie Baylor was charged with forcible rape, forcible sodomy, assault with intent to commit rape, and related burglary and robbery of two victims. Several months before trial, David Stockwell, a criminalist, issued a report in which he compared a blood and saliva sample from Baylor with seminal fluid from vaginal swabs obtained from the first victim, and with semen stains from items of clothing from the second victim. Stockwell concluded that the results would tend to eliminate Baylor as the semen donor because Baylor is a "secretor" and the semen donor was not, but that there was a possibility that Baylor mimics a nonsecretor and that that theory could not be tested without a liquid semen sample from Baylor.

Baylor's counsel knew about the report before trial, but did not follow up with Stockwell or have Baylor tested by another expert. Counsel tried to subpoena Stockwell during trial, but Stockwell was on vacation. The report was inadmissible.

At trial, no witness identified Baylor, and there was no physical evidence that linked Baylor to the crimes. A detective to whom Baylor had confessed, however, testified. Baylor also testified, offering an alibi and recanting his confession. A jury convicted Baylor, and he was sentenced. Baylor filed a petition for writ of habeas corpus with the California Supreme Court, which was denied.

Baylor filed a petition for writ of habeas corpus in the district court, alleging that trial counsel's failure to get the Stockwell report admitted into evidence was ineffective assistance. The court initially adopted the Findings, Conclusions and Recommendations of a magistrate judge denying the petition on the ground that Baylor had not show prejudice in the absence of evidence that he was a nonsecretor. However, the court granted Baylor's motion for relief from judgment and ordered serological testing of his seminal fluid. Based on laboratory results and the opinions of experts, the court found that trial counsel's performance was "completely inadequate" and that there was "at least a reasonable probability that the evidence presented would have tended to show" that Baylor could not have been the source of semen found. Baylor's federal petition pursuant to 28 U.S.C. § 2254 was granted. The State appealed, challenging the writ and arguing that new provisions of § 2254 in the Antiterrorism and Effective Death Penalty Act of 1996 (Antiterrorism Act) required reversal.

[1] Whether or not Stockwell's report was itself conclusive, the report was one test away from tilting the scale powerfully in Baylor's direction. Even without further testing, the report would have greatly decreased the odds that Baylor was the donor and buttressed the credibility of Baylor's alibi and recantation at trial. The district court was correct in concluding that counsel did not give reasonably effective assistance.

[2] Although Baylor's confession was strong evidence that he committed both assaults, it could not be said that the district court erred in concluding that he was prejudiced. The laboratory reports and the analysis of two experts indicated that Baylor did not mimic a nonsecretor and therefore could be excluded as the donor of the semen found on the first victim. [3] Baylor showed prejudice.

[4] Whether or not the Antiterrorism Act applies to pending appeals, the decision in this case would be the same. The state

court decision was contrary to clearly established federal law determined by the Supreme Court in a case.

COUNSEL

Alene M. Games, Deputy Attorney General, Los Angeles, California, for the respondents-appellants.

Seymour I. Cohen, Torrance, California, for the petitioner-appellee.

OPINION

RYMER, Circuit Judge:

Ronnie Earl Baylor's trial counsel failed to follow-up on a criminalist's report that concluded that a semen sample taken from one of the victims he was convicted of sexually assaulting might not have come from Baylor. Baylor's petition for writ of habeas corpus filed in the California Supreme Court, which raised ineffective assistance of counsel, was denied without citation to authority; his federal petition pursuant to 28 U.S.C. § 2254 was granted following an evidentiary hearing. The state has timely appealed, challenging the writ under the "old law," and arguing in addition that the new provisions of § 2254[1] (enacted April 24, 1996, after the district court's

[1]Amended section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

decision was rendered and opening briefs were filed) in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, (Antiterrorism Act), apply to this appeal and also require reversal.

Because we affirm the district court's writ of habeas corpus, we must decide whether § 2254(d), upon which the state relies, requires a different result. Whether or not the new Act will apply to other cases on appeal, *Strickland v. Washington*, 466 U.S. 668 (1984), has long been clearly established federal law determined by the Supreme Court of the United States. We therefore conclude that our analysis in this case is not affected by § 2254(d).

We have jurisdiction, 28 U.S.C. §§ 1291, 2253, and affirm.

I

Baylor was charged with forcible rape, forcible sodomy, assault with intent to commit rape and related burglary and robbery of two victims occurring in December 1986 and January 1987. Several months before trial, David Stockwell, a criminalist in the Sheriff's Crime Laboratory, issued a report in which he compared a blood and saliva sample from Baylor with seminal fluid from vaginal swabs obtained from the first victim, and with semen stains from items of clothing from the second victim. Stockwell concluded that the results would tend to eliminate Baylor as the semen donor because Baylor is a "secretor" and the semen donor wasn't, but that there is a possibility that Baylor mimics a nonsecretor and that this theory could not be tested without a liquid semen sample from

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law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Baylor. Baylor's counsel knew about the report before trial but neither followed-up with Stockwell nor had Baylor tested by another expert. While counsel tried to subpoena Stockwell during trial, it turned out that Stockwell was on vacation; without a foundation, the report was, of course, inadmissible.

At trial, no witness identified Baylor and there was no physical evidence linking him to the crimes. However, Baylor had confessed, in some detail, on tape, to detective Roderick, who testified; Baylor also testified, offering an alibi (which his wife corroborated for the first victim) and recanting his confession, saying that he confessed only because Roderick threatened him and fed him the details.

The jury convicted Baylor on all counts, and he was sentenced to a term of 16 years in custody. After his sentence was affirmed on direct appeal, Baylor filed a petition for writ of habeas corpus with the California Supreme Court June 19, 1990, which was denied August 15, 1990 without citation to authority. Baylor then filed his petition for writ of habeas corpus in the district court, alleging that trial counsel's failure to get the Stockwell report admitted into evidence was ineffective assistance. Although the district court initially adopted the Findings, Conclusions and Recommendations of the magistrate judge denying the petition on the ground that Baylor had not shown prejudice in the absence of evidence that he was a nonsecretor, the court granted Baylor's motion for relief from judgment and ordered serological testing of his seminal fluid. Based on laboratory results and the opinions of both a defense expert as well as an independent expert that the semen on the vaginal swabs is genetically incompatible with originating from Baylor, the district court found that trial counsel's performance was "completely inadequate" and that "there is at least a reasonable probability that the evidence presented would have tended to show that Petitioner could not have been the source of the semen found in [the] victim." The court further concluded that, even in the face of the strong evidence provided by Baylor's taped confession, "there is a

reasonable probability that the evidence that would have been presented but for counsel's ineffective assistance would have injected reasonable doubt in the jurors' minds in regards to all of Petitioner's convictions."

II

A

The state argues that Baylor was not denied effective assistance for a variety of reasons that are unpersuasive to us. Among them: trial counsel tried to check on Stockwell's availability before trial; he subpoenaed Stockwell when he found out, during trial, that the district attorney didn't intend to call him; when he learned that Stockwell was on vacation, he tried to get the report admitted anyway, which the court declined to do; he discussed a writ of prohibition with Baylor that would have continued the trial, but Baylor didn't "want to continue this"; and he could reasonably have decided to attack or minimize Baylor's confession instead of pursuing Stockwell's report, which he thought was inconclusive.

[1] We have difficulty understanding how reasonably competent counsel would not recognize "the obvious exculpatory potential of semen evidence in a sexual assault case," *Thomas v. Goldsmith*, 979 F.2d 746, 750 n.2 (9th Cir. 1992), particularly when the criminalist's report plainly indicates that the donor was an ABO nonsecretor whereas Baylor was an ABO type "O" secretor and that this "would thus eliminate" Baylor as the perpetrator unless a test (for the H antigen level) on a liquid semen sample showed that he mimicked a nonsecretor, in which case he would conform to the semen donor profile. Whether or not Stockwell's report was itself conclusive, it was one test away from tilting the scale powerfully in Baylor's direction. Even without further testing, Stockwell's report would have greatly decreased the odds that Baylor was the donor (as Stockwell testified at the evidentiary hearing, there was only a 5% likelihood that a secretor would mimic

a nonsecretor), and buttressed the credibility of Baylor's alibi and recantation at trial. For these reasons, we agree with the district court that counsel did not give reasonably effective assistance. *Strickland*, 466 U.S. at 691 (counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *see, e.g., Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (counsel ineffective where he knows of, yet fails to investigate, another person's purported confession); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) (counsel ineffective where documents that indicate the defendant's history of mental problems are available yet he fails to investigate a possibility of mental impairment as a mitigating factor for sentencing purposes); *see also Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir. 1992) (counsel was ineffective where counsel knows of a potentially exculpatory gun residue report yet counsel fails to investigate adequately).

B

The more difficult question is whether Baylor was prejudiced, the second prong of the *Strickland* analysis. Baylor confessed, and his confession was corroborated by the victims' version of the attacks. Although he testified that his confession was coerced, there is no finding that it was; also, Baylor confessed to details that the state argues would have been unknown to the victims or the detective. In particular, Baylor confessed that he removed five bullets from a gun he found in the first victim's house and put them under the cushion of a large chair in her living room. There is evidence that these bullets were not discovered until after Baylor told Roderick where they were. Also, as the state points out, the jury credited Roderick's testimony instead of Baylor's. In any event, the state contends, the case against Baylor was strong even with the laboratory reports produced at the evidentiary hearing, because the reports were inconclusive and disputed.

[2] Although Baylor's confession is strong evidence that he committed both assaults, we cannot say that the district court

erred in concluding that he was prejudiced. Our confidence in the outcome of the trial is shaken by the results of the test on Baylor's semen that Stockwell's report suggested would resolve his secretor status. The laboratory reports, and the analysis of two different experts, indicate that Baylor does not mimic a nonsecretor and therefore can be excluded as the donor of the semen found on the first victim.

The state argues that the science upon which Baylor relies isn't reliable because, for example, serological tests performed in 1994 do not necessarily eliminate Baylor since his semen could have changed over the course of seven years, and because of the possibility that the semen recovered from the victim's vaginal swab wasn't Baylor's and that Stockwell missed "H" antigens present on the original sample due to operator error. Baylor's expert says otherwise, and after carefully considering all the evidence, the district court found that Stockwell's reasons for concluding that the scientific evidence that would have been presented at trial may not have excluded Baylor are without scientific foundation. We cannot say that the court clearly erred.

[3] The state also argues that even in the face of evidence arguably excluding Baylor as the semen donor, that evidence cannot overcome the force of his detailed confession. As the district court concluded, however, reasonable doubt about the rape of the first victim would necessarily have raised a reasonable doubt about the validity of his confession. Inasmuch as all of Baylor's convictions were based on the same confession, we cannot disagree with the court's conclusion that there is a reasonable probability that the evidence that would have been presented but for counsel's ineffective assistance would have injected reasonable doubt in regard to all his counts. There were no witness identifications, and there was no physical evidence linking Baylor to the crime scenes. Baylor has, therefore, shown prejudice. *Strickland,* 466 U.S. at 694.

III

[4] Prior to oral argument, the state requested an opportunity to file supplemental briefing on the issue of the retroactivity of the Antiterrorism Act. In turn, we asked both parties to brief the applicability of the Act. Having considered the supplemental briefs, we conclude that whether or not the Act applies to pending appeals, our decision would be the same. Section 2254(d), upon which the state relies in this case, provides that a writ of habeas corpus shall not issue unless the petitioner establishes that the state court decision was contrary to clearly established federal law as determined by the United States Supreme Court. In this case, the state court decision was contrary to clearly established federal law determined by the Court in *Strickland. See Ayala v. Speckard,* __ F.3d __, 1996 WL 390969, at *7 (2d Cir. July 15, 1996) (adopting similar approach).

To the extent that the state suggests that the Act somehow makes the district court's evidentiary hearing irrelevant, we disagree. It appears to argue that federal courts lack jurisdiction to review anything other than the state court judgment. Without regard to how the Act may change the way things are done in the future, in this case both parties agreed that the evidentiary hearing was proper and Baylor's first chance to develop the factual basis of this claim was in the federal district court. We therefore decline to disregard what the district court did.

AFFIRMED.

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APPENDIX B

FILED: OCT. 24, 1996

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONNIE EARL BAYLOR,
Petitioner-Appellee,

v.

WAYNE ESTELLE, WARDEN;
ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA,
Respondents-Appellants.

Before:BRUNETTI and RYMER, Circuit Judges, and TANNER,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Brunetti and Rymer vote to reject the suggestion for rehearing en banc and Judge Tanner so recommends.
The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).
The petition for rehearing is DENIED and the suggestion for a rehearing en banc is **REJECTED**.

---

* Honorable Jack E. Tanner, Senior United States District Judge, Western District of Washington, sitting by designation.

APPENDIX C

FILED: AUG. 15, 1990

ORDER DENYING WRIT OF HABEAS CORPUS

No. S016124

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE RONNIE EARL BAYLOR

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

"s/Panelli"
Acting Chief Justice

ORIGINAL
ORIGINAL
No. 96-1307

Supreme Court, U.S.
FILED
FEB 20 1997
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

WILLIAM DUNCAN, Warden, *Petitioner,*

v.

RONNIE EARL BAYLOR, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

If a state court denies a state prisoner a meaningful adjudication of a meritorious federal constitutional claim in state court proceedings and then denies relief without citation or explanation, must the federal court nonetheless "defer" to the state court's unexplained denial of relief under Title 28, U.S.C. section 2254(d)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996?

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No. 96-1307

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

WILLIAM DUNCAN, Warden, *Petitioner*,

v.

RONNIE EARL BAYLOR, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Ronnie Earl Baylor (hereafter "respondent") respectfully requests that this Court deny the Petition for Writ of Certiorari (hereafter "Petition") filed by petitioner William Duncan (hereafter "petitioner"). This case presents no compelling reasons requiring review by this Court. See S. Ct. R. 10.

STATEMENT OF THE CASE

Several months before respondent's trial on charges of forcible rape and sodomy, a criminalist in the Sheriff's Crime Laboratory issued a report stating his preliminary results tended to eliminate respondent as the donor of semen found on one of the victims, and that further testing could resolve the issue conclusively. Respondent's trial counsel, although aware of the report, neither had respondent's semen tested further nor followed up with the Sheriff's Crime Laboratory criminalist.

Trial counsel did not serve a subpoena on the criminalist until after the trial had already begun; the criminalist, however, was on vacation. Without the criminalist's testimony, the report was ruled inadmissible. *Baylor v. Estelle*, 94 F.3d 1321, 1323 (9th Cir. 1996).

No witness identified respondent as the perpetrator and no physical evidence linked him to the crimes. The prosecution introduced evidence of respondent's confessions to the offenses. Respondent testified at trial, recanted his confessions, and offered an alibi for one of the offenses. Respondent was convicted on all counts and sentenced to 16 years in custody; his conviction and sentence were affirmed on appeal. *Id.*

On June 19, 1990, respondent filed a state habeas corpus petition *in propria persona*. In that petition, respondent alleged, *inter alia*, that trial counsel's failure to get the criminalist's report admitted into evidence denied him the effective assistance of counsel. On August 15, 1990, the California Supreme Court denied respondent's petition without a hearing. The state court's opinion states, *en toto*: "Petition for writ of habeas corpus DENIED." Petitioner's Appendix C.

After initially denying respondent's application for federal habeas corpus relief, the federal district court granted respondent's motion for relief from judgment and ordered serological testing of respondent's seminal fluid. Both a defense expert and an independent expert concluded respondent's semen was genetically incompatible with that recovered from the victim. The district court found the conclusion of the state's expert that the serological evidence did not exclude respondent to be "without scientific foundation." *Baylor*, 94 F.3d at 1324-25. The district court granted the writ, concluding counsel did not provide reasonably effective assistance and respondent was therefore entitled to relief under *Strickland v. Washington*, 466 U.S. 688 (1984). *Id.* at 1323. The state appealed.

While the case was pending on appeal before the United States Court of Appeals for the Ninth Circuit, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). At petitioner's request, the court of appeals ordered supplemental briefing on the implications of the AEDPA for this case. In his supplemental brief, petitioner conceded the evidentiary hearing before the district court was proper at the time, but argued that it had "become irrelevant" in light of the AEDPA's amendments to 28 U.S.C. § 2254(d), and the court of appeals should disregard the serological evidence presented to the district court.

The court of appeals panel unanimously concurred in the district court's decision that respondent demonstrated both the inadequacy of trial counsel's performance and prejudice resulting therefrom, and was therefore entitled to relief. *Baylor*, 94 F.3d at 1323. The court noted that the criminalist's report, which recommended further serological testing to exclude respondent as the semen donor, was only "one test away from tilting the scale powerfully in Baylor's direction," but "[e]ven without further testing [the] report would have greatly decreased the odds that Baylor was the donor . . . and buttressed the credibility of Baylor's alibi and recantation at trial." *Id.* at 1324. Moreover, the court's "confidence in the outcome of the trial [was] shaken by the results of the test on Baylor's semen" that had been ordered by the district court; the test excluded Baylor as the semen donor. *Id.*

The court of appeals rejected the state's suggestion that the AEDPA required it to disregard the serological evidence presented to the district court, noting that the federal evidentiary hearing was "Baylor's first chance to develop the factual basis of this claim." *Id.* at 1325. In addition, the court concluded the AEDPA did not affect respondent's entitlement to relief:

> . . . whether or not the Act applies to pending appeals, our decision would be the

same. Section 2254(d), upon which the state relies in this case, provides that a writ of habeas corpus shall not issue unless the petitioner establishes that the state court decision was contrary to clearly established federal law as determined by the United States Supreme Court. In this case, the state court decision was contrary to clearly established federal law determined by the Court in *Strickland.*

Id.

REASONS WHY THE PETITION SHOULD BE DENIED

First, the AEDPA has no application to cases pending at the time of its enactment. As the Court will consider the Act's application to pending cases in *Lindh v. Murphy*, No. 96-6298, respondent will not address that issue in any greater detail here. However, because the AEDPA does not apply, this case presents only a straightforward issue of counsel's ineffectiveness. The showing required to demonstrate the ineffective assistance of counsel, has been well-established since *Strickland v. Washington*, 466 U.S. 668 (1984). This court need not grant certiorari to reaffirm that counsel's failure to investigate and present obviously exculpatory evidence deprives a criminal defendant of the effective assistance of counsel.

Moreover, assuming *arguendo* that the AEDPA applies to respondent's case, there is no conflict among the courts of appeal as to whether a *de novo* standard of review is appropriate under the Act when a state court fails to meaningfully adjudicate a state prisoner's federal constitutional claims. When respondent presented his Sixth Amendment claim to the California Supreme Court in his state habeas petition, the state court provided respondent no opportunity for further factual or legal development, and summarily rejected the claim in an unexplained decision. The lower federal courts concur that such proceedings do not constitute a meaningful adjudication sufficient to satisfy the prerequisites for application of amended 28 U.S.C. § 2254(d)(1), and no "deference" to the state court's decision is required.

Next, assuming *arguendo* that the prerequisites for application of section 2254(d)(1) to respondent's case are met and there exists a conflict between the decision below and those of the courts of appeal in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *cert. granted in part*, 117 S.Ct. 726 (1997), and *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *petition for cert. filed* (Jan. 6, 1997) (No. 96-7359), the petition for writ of certiorari should still be denied. The resolution of any perceived conflict is irrelevant to the outcome of this case. Even under the interpretation given section 2254(d)(1) by the courts of appeal in *Lindh* and *Drinkard* -- that habeas relief can be granted on mixed questions of law and fact only if the federal court determines the state court application of controlling Supreme Court precedent was "unreasonable" -- respondent is nonetheless entitled to relief on his ineffective assistance of counsel claim. *See Hall v. Washington*, ___ F.3d ___, 1997 WL 42967 (7th Cir. Feb. 4, 1997); *Berryman v. Morton*, 100 F.3d 1089 (3rd Cir. 1996).

Finally, the court of appeals applied the correct standard when it determined respondent was entitled to relief under amended section 2254(d)(1) because the state court's decision denying relief was "contrary to" clearly established law as enunciated in *Strickland v. Washington*. The Ninth Circuit's interpretation of section 2254(d)(1) is wholly consistent with both that section's statutory language, its legislative history, and the fundamental role of Article III judges in our constitutional system.

I.
THERE ARE NO CONFLICTS AMONG THE COURTS OF APPEAL BECAUSE RESPONDENT WAS NOT PROVIDED A MEANINGFUL ADJUDICATION OF HIS CLAIM IN STATE COURT.

Petitioner asserts that certiorari is appropriate because the Ninth Circuit's decision in this case conflicts with those in *Lindh* and *Drinkard*. Despite petitioner's protestations, the decisions of the

courts of appeal do not conflict. Because respondent was not provided a meaningful adjudication of his ineffective assistance of counsel claim in his state habeas corpus proceedings, and the California Supreme Court summarily rejected respondent's claim in an unexplained "order" denial, the Fifth and Seventh Circuits would have reached exactly the same result as did the Ninth Circuit here.

Congress' intent in amending 28 U.S.C. § 2254(d) was to preclude federal habeas courts from relitigating constitutional claims that were fully litigated, thoughtfully considered, and correctly decided in the state courts. Underlying the additional respect afforded state court decisions under §2254(d)(1) is the statutory premise that state courts meaningfully address federal constitutional claims, and put forth their best independent judgment after the relevant facts and law have been fully developed and assessed with care and deliberation. Only when a state court decision, and more importantly, the path followed in reaching that decision, reflects such vigilance for the preservation of federal rights is it entitled to weighty consideration by a federal court on habeas review.

That a careful state court deliberative process is a prerequisite to application of section 2254(d)(1) is clear from the statutory language. Section 2254(d) states that "[a]n application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- resulted in a decision . . ." Thus, section 2254(d)(1) is applicable if, and only if, a petitioner's claim was "*adjudicated* on the merits," and that *adjudication* "resulted in a *decision*" by the state court.

Not surprisingly, the courts of appeal which have considered the issue concur that before section 2254(d)(1) can be applied, a federal court must first examine the threshold question of whether the state court rendered a decision that was meaningfully adjudicated. *Drinkard*, 97 F.3d at 768 ("In applying § 2254(d)(1), as amended by the AEDPA, we must first determine whether Drinkard's claim

regarding the challenged instruction during the sentencing phase of his trial was adjudicated on the merits in state court proceedings."); *Lindh*, 96 F.3d at 871 ("§ 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject.") That is, the federal court must determine if the state court's decision follows an opportunity for full factual and legal development of constitutional issues, and whether that decision reflects the level of deliberation essential to the accurate resolution of those constitutional issues. *Neal v. Gramley*, 99 F.3d 841, 843 (7th Cir. 1996) (section 2254(d)(1) does not apply to a state court's determination of constitutional claim unless "the determination was made after the petitioner had a full and fair opportunity to litigate the issue"); *Lindh*, 96 F.3d at 871 ("a responsible, thoughtful answer reached after a full opportunity to litigate is adequate" to allow application of section 2254(d)(1).)

The lower federal courts have considered various factors relevant to the determination of whether a claim was adjudicated in a meaningful way by the state courts: (1) whether the state court conducted an evidentiary hearing, *Moore v. Johnson*, 101 F.3d 1069, 1075 (5th Cir. 1996); *Curtis v. Class*, 939 F. Supp. 703, 708 (D.S.D. 1996); (2) whether the state court heard testimony or received evidence from both parties, *Moore*, 101 F.3d at 1075; *Neal*, 99 F.3d at 843; (3) whether the state court appointed counsel, *Curtis*, 939 F. Supp. at 708; (4) whether the state court appointed defense experts, *id.*; and (5) whether the state court issued detailed findings of fact and conclusions of law in support of its judgment, *Moore*, 101 F.3d at 1075; *Drinkard*, 97 F.3d at 768.

If no meaningful adjudication was conducted by the state court, then the policies and legislative assumptions underlying application of section 2254(d)(1) are absent and the provision cannot be applied. If section 2254(d)(1) does not apply, then the federal court reviews the federal constitutional claims *de novo*. *Lockhart v. Johnson*, 104 F.3d 54, ___, 1997 WL 7311 at *4 (5th Cir.

1997).

Here, the California Supreme Court held no evidentiary hearing on respondent's ineffective assistance of counsel claim. Respondent proeeeded *in propria persona* and was provided no expert assistance. No testimony nor evidence was received from either party. No findings of fact nor conclusions of law accompanied the state court's decision. Rather, the court issued a summary, unexplained order stating only, "Petition for writ of habeas corpus DENIED." Petitioner's Appendix C. As the Ninth Circuit noted, the evidentiary hearing held by the federal district court was respondent's "first chance" to develop the factual basis of his ineffective assistance of counsel claim. *Baylor*, 94 F.3d at 1325. None of the various factors considered by the lower federal courts to be prerequisites for application of section 2254(d)(1) are present in this case. As a result, all would concur that the Ninth Circuit's plenary consideration of respondent's Sixth Amendment claim was entirely appropriate.

Certiorari is appropriate to resolve conflicts among the courts of appeal in cases "in which the facts are substantially similar and the issues the same." *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938). No true conflict exists, however, among decisions where the facts are not substantially similar. The procedural record presented to the court of appeals in this case differs dramatically from that presented the courts of appeal in *Lindh* and *Drinkard*. Later decisions of the Fifth and Seventh Circuits discussing the prerequisites for application of section 2254(d)(1) make clear that had this case been presented to those courts, respondent's ineffective assistance of counsel claim would have been given plenary consideration. There is no conflict among the circuit courts necessitating this Court's grant of certiorari.

II.
CERTIORARI IS NOT NECESSARY BECAUSE RESOLUTION OF THE PURPORTED CONFLICT IS IRRELEVANT TO RESPONDENT'S ENTITLEMENT TO HABEAS CORPUS RELIEF.

Petitioner insists that certiorari is appropriate because the decision of the court of appeals in this case conflicts with those in *Lindh* and *Drinkard* regarding the interpretation of section 2254(d)(1). *Lindh* and *Drinkard* held that the first clause of section 2254(d)(1) -- "contrary to . . . clearly established Federal law" -- applies to only pure legal questions while the second "unreasonable application" clause governs review of all mixed questions of law and fact. *Lindh*, 96 F.3d at 870; *Drinkard*, 97 F.3d at 768. Because counsel's ineffectiveness is a mixed question of law and fact, and the court of appeals below never mentioned the word "unreasonable" in its opinion, petitioner argues, this court should grant certiorari to resolve the "conflict" between the circuit courts.

However, resolution of this alleged conflict is irrelevant to the ultimate outcome of respondent's case. Even if the Ninth Circuit were to use the analysis employed by other circuit courts to determine whether a state court's denial of an ineffective assistance of counsel claim was an "unreasonable application" of *Strickland* under section 2254(d)(1), respondent would still be entitled to relief. Thus, assuming *arguendo* that the prerequisites for application of section 2254(d)(1) to respondent's case exist, and that a conflict exists between the decision below and *Lindh* and *Drinkard* regarding the interpretation of section 2254(d)(1), the petition for writ of certiorari should still be denied. This court need not grant certiorari simply because the court of appeals did not use the magic word "unreasonable."

Since the enactment of the AEDPA, two other courts of appeal have applied the Act to ineffective assistance of counsel claims and nonetheless granted relief. *See Hall v. Washington*, ___

F.3d ___, 1997 WL 42967 (7th Cir. Feb. 4, 1997); *Berryman v. Morton*, 100 F.3d 1089 (3rd Cir. 1996). In each of these cases, the court applied the standard of review petitioner seeks to have applied to respondent's case -- whether the state court's decision was an "unreasonable application" of federal law.[1] Both courts reviewed the record in great detail, and independently determined that the state prisoner had established a Sixth Amendment violation under *Strickland* in large part because counsel had failed to investigate and present critical evidence. *Hall*, 1996 WL 42967 at *7-11 (failure to investigate and present evidence in mitigation of penalty in capital case); *Berryman*, 100 F.3d at 1093 (failure to investigate and present evidence that would have cast substantial doubt upon victim's identification of petitioner as perpetrator). In each, upon determining that the habeas petitioner had established a Sixth Amendment violation, the court perfunctorily concluded that relief was required notwithstanding the AEDPA's amendment of section 2254(d)(1).

For example, in *Berryman*, the Third Circuit held that trial counsel's

> performance was severely deficient and his errors were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, at 687. As a result of his errors Berryman was deprived of a fair trial. *Id.* Given that woefully inadequate and deficient performance and the prejudice that performance caused Berryman, we cannot uphold the state court's determination that trial counsel had a reasonable trial strategy. That

---

[1] This is not to say that both courts have held that the "unreasonable application" standard applies to mixed questions of law and fact. *See Berryman*, 100 F.3d at 1104 (declining to determine the amount of deference that federal courts must afford to state court decisions because "we are convinced that even if we apply the standard of review for state court resolution of mixed questions of fact and law discussed in *Lindh v. Murphy*, Berryman would prevail.")

determination was clearly an unreasonable application of *Strickland* to the facts of this case.

Berryman, 100 F.3d at 1104. Similarly, in *Hall*, once the court determined that counsel was ineffective under *Strickland*, it concluded without further discussion that "the state court's finding that Hall's counsel provided effective assistance at sentencing 'involved an unreasonable application of clearly established Federal law' as determined by the Supreme Court." *Hall*, 1997 WL 42967 at *6. As the Seventh Circuit explained, the "unreasonable application" standard does not require a federal habeas court to defer in all cases to the state court's decision. Rather, "[s]ome decisions will be at such tension with governing U.S. Supreme Court precedents . . . that a writ must issue." *Id.*

If the "unreasonable application" analysis used in *Berryman* and *Hall* is applied to respondent's ineffective assistance of counsel claim, respondent is nonetheless entitled to habeas relief. As in both *Berryman* and *Hall*, the Ninth Circuit reviewed the record in great detail and independently determined that respondent's trial counsel was ineffective under *Strickland*. As in *Berryman*, given counsel's "deficient performance and the prejudice that performance caused," the state court's denial of relief to Baylor "was clearly an unreasonable application of *Strickland* to the facts of this case." *Berryman*, 100 F.3d at 1104. Moreover, the state court's denial of relief on respondent's ineffective assistance of counsel claim is "at such tension with governing U.S. Supreme Court precedents . . . that a writ must issue." *Hall*, 1997 WL 42967 at *6. Accordingly, even if the Ninth Circuit had used the "unreasonable application" analysis employed by the Third and Seventh Circuits in *Berryman* and *Hall* to review the state court's denial of respondent's ineffective assistance of counsel claim, respondent nonetheless is entitled to relief. This court need not grant the petition for writ of certiorari to resolve a "conflict" such as this.

III.
THE PETITION PRESENTS NO IMPORTANT QUESTION OF STATUTORY INTERPRETATION BECAUSE THE COURT BELOW PROPERLY CONSTRUED AMENDED 28 U.S.C. § 2254(d)(1).

The court of appeals applied the correct standard when it determined the state court's decision denying respondent relief was "contrary to" clearly established law as enunciated in *Strickland*. The construction of section 2254(d)(1) urged by petitioner and adopted by the courts of appeal in *Lindh* and *Drinkard* misreads the section's plain language, ignores its legislative history, and raises constitutional concerns.

A. Section 2254(d)(1)'s Plain Meaning.

Until the enactment of the AEDPA, federal courts were required to resolve *de novo* habeas petitioners' claims, whether those claims presented pure questions of law or mixed questions of law and fact. As a consequence, a state court's decision was treated as nothing more than "the conclusion of a court of last resort of another jurisdiction." *Brown v. Allen*, 344 U.S. 443, 458 (1953). Until 1989, moreover, a federal court could grant habeas relief on the basis of legal principles that were not in existence when the state court ruled. *Cf. Teague v. Lane*, 489 U.S. 288 (1989). And until the AEDPA was passed, federal courts could grant habeas relief on the basis of legal principles that never bound the state courts, i.e., federal circuit court authority developed in the absence of authority from this Court on point. Thus, prior to the AEDPA, the state court's previous resolution of the same claim in the same case was all but irrelevant.

Under petitioner's reading of the amendments to section 2254(d)(1), the AEDPA not only rescued the decisions of state courts from near irrelevancies; it relegated federal courts to the status of near rubber stamps. The appropriate interpretation of section 2254(d)(1)'s plain language,

however, allows federal courts to respect state court decisions without also withdrawing the independence of the federal judiciary.

Properly interpreted, section 2254(d)(1) changes federal habeas review in three ways. First, section 2254(d)(1) makes the state court decision the focus of federal review. The federal court must review the state court "*decision*" on the basis of the governing "Federal law," and if that decision was correct, it is the law of the case. Second, under section 2254(d)(1), the only "Federal law" to which the state court decision may be compared is "clearly established law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This feature unqualifiedly limits federal review to legal rules in effect when the state court decided the case. Third, under section 2254(d)(1) the federal court must deny relief unless its review of the state decision reveals one of two defects: (1) the decision was "contrary to" clearly established Supreme Court law; or (2) involved an "unreasonable application" of that law.

While *Lindh* and *Drinkard* correctly determined that the two distinctive clauses of section 2254(d)(1) have independent work to do, those decisions misconstrue the assignment Congress gave to each clause. The first clause, requiring federal judges to determine whether the state court decision was "contrary to" clearly established Supreme Court law, can *only* apply when the body of law established by this Court includes a rule designed to govern the habeas petitioner's claim. If no such rule exists, the second clause of section 2254(d)(1) delineates the analysis to be employed: the state court decision will stand unless the state court acted unreasonably in fashioning its own rule from this Court's pertinent precedents.

Thus, under the plain language of section 2254(d)(1), a federal court must determine, in reviewing a state court's decision, whether this Court has clearly prescribed a rule for claims of the

sort petitioner presented. If so, the federal court asks whether the state court decision was contrary to that clearly established Supreme Court precedent. If there was no established Supreme Court precedent, then the federal court must determine whether the state court unreasonably applied the Supreme Court law that was available.

Here, the Ninth Circuit interpreted new section 2254(d)(1) correctly. It determined that this Court had clearly prescribed a rule for respondent's ineffective assistance of counsel claim in *Strickland*. Because the state court's decision was "contrary to" *Strickland*, respondent was entitled to federal habeas relief.

In the view of petitioner, as well as the courts of appeal in *Lindh* and *Drinkard*, however, section 2254(d)(1) operates differently. Under this view, the "contrary to" clause applies only to determine if the state court identified the correct rule of decision, while the "unreasonable application" clause applies to the review of all mixed questions of law and fact. *See Lindh*, 96 F.3d at 870; *Drinkard*, 97 F.3d at 768. This view is contrary to the plain language of section 2254(d)(1).

Under each clause of section 2254(d)(1), the focus of the federal court's review is the state court *decision*. Decisions are "conclusion[s] of law upon facts." Black's Law Dictionary 842 (6th ed. 1990). Petitioner, *Lindh* and *Drinkard* trivialize the "contrary to law" clause by focusing the federal court's review only on the legal rule that the state court actually articulated.

Moreover, Congress and the courts routinely use the phrase "contrary to law" to establish a mode of adjudication for use by one court in reviewing the decisions of another. For example, district court judges are required to review certain magisterial decisions to see if they are "contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). Circuit courts use the same phrase to describe their review of district court legal decisions under Fed. R. Civ. P. 52(a). In both contexts, the phrase

"contrary to law" is consistently understood to require plenary, *de novo* review of all legal issues, whether "pure" or "mixed."

Indeed, mixed questions of law and fact, including the counsel's effectiveness, have long been "ranked as issues of law." *Thompson v. Keohane*, 116 S.Ct. 457, 465 (1995). This Court has noted that very often "the relevant legal principle can be given meaning *only* through its application to the particular circumstances of a case." *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (emphasis added). The conclusion of the *Lindh* court -- that a dispute over a mixed question of law and fact is not a "dispute [that] lies in the meaning of the Constitution," 96 F.3d at 870 -- is at odds with this Court's longstanding jurisprudence.

Finally, section 2254(d)(1) fails to use the term of art reserved for mixed questions: application of a legal standard *to the facts*. Instead, the "unreasonable application of . . . law" language Congress enacted is similar to that which this Court has used to describe its review of rules fashioned by lower courts in the absence of controlling Supreme Court authority. *See Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring) (if legal principles on which prisoner relies are only broadly relevant, habeas relief may not be granted unless state court decision was a "begrudging or unreasonable application of these principles.")

The Ninth Circuit's interpretation of section 2254(d)(1) -- that habeas relief is required when a state court decision that a state prisoner was not denied the effective assistance of counsel is "contrary to" *Strickland v. Washington* -- is consistent with the statute's plain language.

B. Section 2254(d)(1)'s Legislative History.

The legislative history of section 2254(d)(1) not only establishes the correctness of the Ninth Circuit's analysis, but also demonstrates conclusively that Congress did not intend the pure/mixed

question dichotomy employed by the *Lindh* and *Drinkard* courts. Congress expressly failed to enact legislation that would have directed habeas courts to act just as *Lindh* and *Drinkard* have mistakenly construed section 2254(d)(1) to operate.

The AEDPA's habeas title began as part of the crime bill passed by the House as H.R. 729. *See* 141 Cong. Rec. H1404 (Feb. 8, 1995). In that measure, the House approved a standard that allows habeas corpus relief only if the state court's adjudication:

> (1) resulted in a decision that was based on an arbitrary or unreasonable *interpretation* of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; [or]
>
> (2) resulted in a decision that was based on an arbitrary or unreasonable application *to the facts* of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States[.]

Id. (emphasis added). This language, had it become law, would have codified the mixed/pure dichotomy both *Drinkard* and *Lindh* mistakenly imported into section 2254(d)(1). But when the legislation moved to the Senate, this language was discarded after "extended negotiations," *see* 141 Cong. Rec. S7803 (June 7, 1995) (Sen. Specter), and the present language of section 2254(d)(1) was inserted in its place.

Thus Congress considered and rejected the very standard petitioner propounds. It was entirely appropriate for the Ninth Circuit to have granted respondent habeas corpus relief upon its conclusion that the state court's denial of respondent's ineffective assistance of counsel claim was "contrary to" this Court's decision in *Strickland*.

C. Constitutional concerns.

Finally, the construction of section 2254(d)(1) employed by the courts of appeal in *Lindh* and *Drinkard* -- that habeas relief is unavailable on a mixed question of law and fact if the state court decision would be debatable among reasonable jurists -- raises serious Article III and Suspension Clause problems. Whether or not a claim presents a mixed question of law and fact, or one concerning a pure legal issue, "federal courts, even on habeas, have an independent obligation to say what the law is." *Wright v. West*, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). To provide jurisdiction and yet withhold from the habeas court the power to overturn judicial decisions that are contrary to this Court's settled doctrine violates Article III. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Moreover, no federal judge has ever been required to review a legal decision under federal law, and yet leave it in force despite its conflict with that law. An essential function of the writ of habeas corpus is the preservation of the supremacy of federal law, and "if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

Thus, in interpreting section 2254(d)(1) to require the federal courts to grant habeas relief when the state court's decision was "contrary to" controlling Supreme Court precedent, the Ninth Circuit followed the "cardinal principle" that federal courts read statutes to avoid constitutional questions respecting their impact on federal jurisdiction. *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). Certiorari is not necessary in this case.

CONCLUSION

Petitioner has failed to establish grounds for this Court to review the circuit court's decision.

The petition for writ of certiorari to review the judgment of the Court of Appeals should be denied.

DATED: February 19, 1997

Respectfully submitted,

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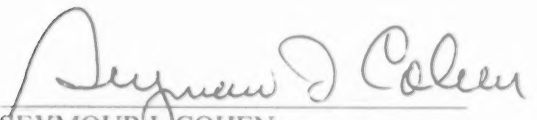
BY: 

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DECLARATION OF SERVICE BY MAIL

I, TERESA FLOWERS, declare:

I am a citizen of the State of California, over the age of 18 years and not a party to the within cause; my business address is 18411 Crenshaw Boulevard, Suite 411, Torrance, California, 90504.

I served a copy of the attached **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on each of the following, by placing same in an envelope addressed as follows:

ATTORNEY GENERAL OF CALIFORNIA
300 South Spring Street
North Tower
5th Floor
Los Angeles, CA 90013
Attn: ALENE M. GAMES, D.A.G.

RONNIE EARL BAYLOR
11725 S. Birch Ave. #C
Hawthorne, CA 90250

Each said envelope was then on February 20, 1997, sealed and deposited in the United States mail at Torrance, California, the County in which I am employed, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed February 20, 1997, at Torrance, California.

Teresa Flowers
TERESA FLOWERS